No. 82-113

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IN THE

Supreme Court of the United States

October Term, 1982

RALPH TUTINO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the New York State Court of Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Whether it was proper for the police to tape record a conversation between petitioner and a police informant where the recording device was placed in an adjoining hotel room because the informant feared for his life if the device was found on his person, and where not only did he consent to the tape recording of his conversation with petitioner but a police detective could also overhear the conversation with his "naked ear."

2. Whether petitioner was subjected to Double Jeopardy where he pleaded guilty, after trial, to nine outstanding indictments which constituted the underlying acts of his conviction of making a usurious loan being part of a "conspiracy and corrupt agreement" to make such loans.

3. Whether the conduct of the prosecutor, where the alleged errors were mostly unpreserved for appellate review under New York State Law, was proper.

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Statement of the Case

The respondent, the State of New York, respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the Court of Appeals of the State of New York's refusal to grant leave to appeal to that Court in this case.

The Facts

There was an abundance of evidence produced at trial, including the testimony of the victim, an eyewitness and a tape recording, that Ralph Tutino made a usurious loan to Barry Bracken in the summer of 1979. In addition, many of the events surrounding the actual payments and collection of the weekly interest were also tape recorded and played to the jury. The People conclusively proved, in satisfaction of New York Penal Law § 190.42* that petitioner's usurious loan to Barry Bracken was part of a conspiracy and corrupt agreement and a scheme and business of making and collecting usurious loans by showing that petitioner also made usurious loans to other victims, including Richard Sanchez and Frank Starace.

After his conviction following a trial by jury of making a usurious loan to Bracken (Indictment No. 2100/79), petitioner pleaded guilty to nine other outstanding usury indictments. Although these indictments charged petitioner with many of the underlying acts used to demonstrate that the usurious loan to Bracken was part of a conspiracy and corrupt business of making these loans, the indictments involved different victims, different amounts, different times of occurrences and for the most part, different co-defendants, than the Bracken indictment. Indeed, the Bracken indictment (Indictment No. 2100/79), only charged petitioner and one other of making a usurious loan to Bracken, that loan being part of a conspiracy to make such loans.

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* New York Penal Law Section 190.42 states that a person is guilty of Criminal Usury in the First Degree when he makes and collects a usurious loan and that loan is part "of a scheme or business of collecting . . ." such loans.

The State Court Proceedings
The Indictments

The Grand Jury of Bronx County, on October 5, 1979, charged petitioner and one Xavier "Sam" Salzarulo with the crimes of Criminal Usury in the First Degree and Grand Larceny in the First Degree against Barry Bracken. Indictment No. 2100/79.

On that date, the Bronx County Grand Jury also filed six other indictments against petitioner and other accomplices: (1) Under Indictment No. 2015/79, petitioner, John Gregory "Buster" Ardito and Salzarulo were charged with the crimes of Criminal Usury in the First Degree and Grand Larceny in the First Degree against Richard Sanchez; (2) Indictment No. 2102/79 charged petitioner and Ralph DeSimone with the crimes of Criminal Usury in the First Degree and Grand Larceny in the First Degree against Richard Sanchez; (3) Indictment No. 2101/79 charged petitioner and Gerry Mastriocovo with the crimes of Criminal Usury in the First Degree (3 counts) and Grand Larceny in the First Degree (3 counts) against Richard Sanchez and Frank Starace; (4) Indictment No. 2115/79 charged petitioner, John Doe "Tony Rings" and Salzarulo with the crimes of Criminal Usury in the First Degree and Grand Larceny in the First Degree against Sanchez; (5) Indictment No. 2099/79 charged petitioner and Ronald Marrazzo a/k/a "Frankie from Teddy's Restaurant" with the crimes of Criminal Usury in the First Degree (2 counts) and Grand Larceny in the Second Degree (2 counts) against Sanchez and Starace; (6) Indictment No. 2098/79 charged petitioner, Frank Langano a/k/a "Frankie from New Jersey," Richard DeLuca a/k/a "Richie from New Jersey"

and Salzarulo with the crimes of Criminal Usury in the First Degree (2 counts) and Grand Larceny in the First Degree (2 counts) against Sanchez and Starace.

On November 13, 1979, the Grand Jury of Bronx County also charged petitioner and Salzarulo with the crime of Criminal Usury in the First Degree against Charles Santoro. Indictment No. 2407/79.

On November 15, 1979, the Grand Jury of Bronx County charged petitioner, Mastriocovo, DeSimone, Marrazzo, DeLuca, John Doe "Tony Rings" and Salzarulo with the crime of Conspiracy in the Fourth Degree. Indictment No. 2447/79.

On November 20, 1979, the Bronx County Grand Jury charged petitioner, Ardito and Louis Evangelista with the crime of Conspiracy in the Fourth Degree. Indictment No. 2475/79.

The Pre-Trial Hearing

On April 7, 1980, a hearing to determine if a police informant, Richard Sanchez, had consented to having his conversation with petitioner on July 17, 1979 tape recorded was conducted.

The People's Case

On July 16, 1979, **Detective Ronald Marsenison** spoke to **Richard Sanchez** about recording a conversation between Sanchez and petitioner which would take place at the Rye Town Hilton Hotel the following day (Marsenison: H. 815;

Sanchez: H. 1261).* The detective asked Sanchez if he would wear "a body recorder" while he was talking with petitioner (A. 243). Sanchez refused to wear the device, fearing that if it were discovered petitioner "would kill him" (A. 243). Sanchez, however, "freely," and "voluntarily" "sign[ed] a permission slip . . ." allowing the upcoming conversation to be recorded (Marsenison: A 243; H. 826, 827, 978; Sanchez: H. 1228, 1229).

On July 17, 1979, at approximately 12:00 p.m., Detective Marsenison occupied the hotel room next to petitioner's (A. 243, 244). Between the two rooms were double doors and underneath each door was a one-half inch space which enabled the detective, if he laid on the floor, to look underneath the door and see the floor of the other room (A. 244). The detective placed a "Nagra" recorder to his left and taped a microphone to the carpet in his room (A. 244). "The wire, the Nagra and the microphone were at all times in . . . [Detective Marsenison's] room . . ." and the microphone was never "actually shoved under the door" (A. 244, 245; Marsenison: H. 1015). No "transmitter" was used, no recording device was ever placed in petitioner's room and the "Nagra" was not activitated until Sanchez entered petitioner's room (A. 256; Marsenison: H. 970, 1030).

About an hour later, Sanchez entered petitioner's room and began to converse with him (A. 2444). Detective Marsenison laid on the floor with his ear to the bottom of the closed door in his room and activated the Nagra (A. 244,

* All references denoted "H." are to the minutes of the hearing; references denoted "A." are to petitioner's appendix, "RA." respondent's appendix; all references denoted "T." are to the trial.

245, 257, 258). The detective stayed in this position for "[t]he better part of an hour . . ." and was able to overhear the conversation with his "ear" (A. 245). After Sanchez and petitioner finished their conversation, the detective stopped the recording device (A. 257). There were no other conversations "monitored" between petitioner or "anyone" by this method on that or any other date (A. 260; Marsenison: H. 856).

The Hearing Court's Decision

The court ruled that Sanchez had consented to having his conversation with petitioner overheard and recorded and that it had no "effect" on the consent that the police occupied the adjoining room (RA. 2, 3). The court also found that Detective Marsenison could overhear the conversation and that "the eavesdropping was accomplished without resorting to any unauthorized physical penetration into the premises occupied by the defendant . . ." (RA. 3). The court concluded that petitioner had a misplaced belief that the person to whom he revealed his confidences would not reveal them (RA. 5).

Petitioner's Judgments of Conviction

Petitioner was convicted after a jury trial of Criminal Usury in the First Degree (New York Penal Law section 190.42) under Indictment No. 2100/79 (usurious loan to Barry Bracken) and was sentenced to an indeterminate term of imprisonment of from 5 to 15 years.

After this conviction, petitioner on July 9, 1980 withdrew his previously entered pleas of not guilty to the out-

standing indictments and pleaded guilty to each and every count of these indictments. Petitioner received concurrent indeterminate sentences of from 5 to 15 years to also run concurrent to the sentence imposed for his conviction under Indictment No. 2100/79.

On April 13, 1982, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed petitioner's judgments of conviction without opinion. On May 21, 1982, The Hon. Jacob D. Fuchsberg, an Associate Judge of the New York Court of Appeals, denied leave to appeal to that Court.

ARGUMENT

POINT ONE

There was no Fourth Amendment violation where the conversation between Richard Sanchez and petitioner was recorded with the consent of Sanchez and the police detective was able to overhear it [answering petitioner's petition, Point One, pp. 8-17].

Petitioner contends that: (1) the police allegedly invaded his right to privacy by the means in which they recorded his conversation with Richard Sanchez on July 17, 1979; (2) it was improper for Detective Marsenison to overhear the conversation; and (3) Sanchez allegedly had "no right to consent to police eavesdropping via pervasive electronic equipment piercing the walls and door of petitioner's hotel room . . ." (Petitioner's Petition, p. 15). All of these claims are meritless.

Here, the informant Sanchez gave written permission to have his conversation with petitioner at the Rye Town Hilton Hotel recorded. However, since Sanchez feared that petitioner "would kill him" if a recording device attached to Sanchez' body was discovered, Detective Marsenison, about an hour before Sanchez was to meet petitioner placed a recording device in the room the detective rented next door to petitioner's. The device and microphone were at all times in the detective's room and the microphone was never actually placed under the door. No transmitter was used, no recording device was ever placed in petitioner's room and the recorder was not activated until Sanchez had entered petitioner's room.

Petitioner's claims, which have been rejected by the Hearing Court, five New York Appellate Division Judges and one New York Court of Appeals Judge, are based on the totally artificial distinction between an agent wearing a recording device on his person and having the device placed in an adjoining room. Clearly in either situation, however, the Government did not use the device to listen in on a conversation it could not otherwise have heard and the device would neither see nor hear more than the agent himself. *Lopez* v. *United States*, 373 U.S. 427, 439 (1963).

In this regard, the Fourth Amendment protects people, not places. *Katz* v. *United States*, 389 U.S. 347, 351 (1967). There is no constitutionally protected expectation of privacy when a man, in his hotel room, relies upon a misplaced confidence that a person to whom he voluntarily confides his wrongdoing will not reveal it. *United States* v. *White*, 401 U.S. 745, 749 (1971), *reh. denied*, 402 U.S. 990 (1971);

Hoffa v. *United States*, 385 U.S. 293, 301-02 (1966). Moreover, "[i]f the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case." *United States* v. *White, supra* at 752. Thus, if it is constitutionally proper to record the unprotected conversation by means of a device placed on an informant's body, there should be no reason not to permit recordings by a device which is utilized and operated as if on the agent's body, but placed in an adjoining hotel room. In either case, petitioner does not have a reasonable expectation of privacy that his voluntary disclosures to Sanchez will not later be revealed.

In addition, when one of the parties consents to the recording of a conversation, there is no Fourth Amendment violation. *See* 18 USC 2511(2)(c); NYCPL 700.05(3); *United States* v. *Axselle*, 604 F.2d 1330, 1338 (10th Cir. 1979); *United States* v. *Horton*, 601 F.2d 319 (7th Cir. 1979); *United States* v. *Santillo*, 507 F.2d 629 (3d Cir. 1975); *United States* v. *Bonanno*, 487 F.2d 654 (2d Cir. 1973);* *cf. People* v. *Beavers*, 393 Mich. 554, 227 NW2d 511 (1975), *cert. denied*, 423 U.S. 878 [a decision found not "persuasive" by the court in *United States* v. *Horton*, *supra* at 321. In *Beavers*, the conversation was actually "monitored" by the police]. Since here, Richard Sanchez voluntarily and freely consented to the recording of the conversation, petitioner's Fourth Amendment rights were not violated.

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* A more exhaustive list of cases supporting this proposition can be found in *United States* v. *Santillo*, *supra* at 634 n.15.

Furthermore, it has been held that what can be heard by the naked ear is not protected by the Fourth Amendment since there is no justifiable expectation of privacy. *United States* v. *Agapito*, 620 F.2d 324, 330 (2d Cir. 1980); *cf. United States* v. *Guilbe Irizarry*, —— F.2d —— (1st Cir. 1982), 31 Cr. L. 2073 [exploratory search incident to arrest, where police officer looked into space created by an ajarred ceiling panel]. Here, as in *Agapito*, the detective merely heard conversations by the naked ear. Although an electronic device was being used, this was a *recorder*, not a transmitter or amplifier. In addition, as petitioner conceded at the Appellate Division of the State Supreme Court, "... the police officer had a right to be in the room rented by the police ..." (Petitioner's Appellate Division Brief, p. 26). Moreover, this was a hotel room where petitioner ran the greater risk that his neighbors may have had "interests adverse to his own." *United States* v. *Agapito*, *supra* at 331. Thus, although it may not have been "gentlemanly" for the detective to lie on the floor and overhear petitioner's conversation, petitioner had no justifiable expectation of privacy.

Lastly, petitioner was charged with the crime of Criminal Usury in the First Degree (Penal Law § 190.42). Thus, the People had to prove that petitioner's conduct was part of the business of collecting usurious loans. The People produced ample evidence concerning petitioner's usurious loans to Frank Starace and Richard Sanchez. Since this one isolated tape was but a small part of the overwhelming evidence concerning petitioner's conduct of collecting usurious loans and there was also overwhelming evidence that petitioner collected usurious loans from Barry Bracken,

the named complainant in the indictment, there was no reasonable possibility that if the tape was erroneously entered into evidence, it had contributed to the conviction. *Chapman* v. *California*, 386 U.S. 18 (1967). Thus, even if it was error to admit the tape it was harmless.

POINT TWO

Petitioner was not subjected to double jeopardy [answering petitioner's petition, Point Two, pp. 18-22].

Petitioner, relying on this Court's decision in *Sanabria* v. *United States*, 437 U.S. 54 (1978), argues that he was subjected to Constitutional Double Jeopardy because many of the acts contained in the nine other outstanding indictments that he later pleaded guilty to, were used to prove that his usurious loan to Bracken was part of a conspiracy and corrupt business of making usurious loans. Specifically, he contends that he was allegedly convicted of the same offense after an acquittal, prosecuted for the same offense after conviction and multiply punished for the same offense. All of these claims are meritless.

Petitioner was charged under Indictment No. 2100/79 with the crimes of Criminal Usury in the First Degree [New York Penal Law § 190.42], and Grand Larceny in the First Degree (extortion) [New York Law § 155.40]. Penal Law § 190.42 elevates the crime of Criminal Usury in the Second Degree to a more serious crime when the usurious transaction is "part *of a scheme or business* of making or collecting usurious loans" (emphasis added). Indictment No. 2100/79 charged petitioner with making a usurious loan to

Bracken which was "part *of a conspiracy and corrupt agreement* and a scheme and business . . ." of making these loans (emphasis added).

Petitioner concedes that "[t]he precise manner in which an indictment is drawn cannot be ignored in determining double jeopardy consequences . . ." (Petitioner's Petition, p. 20). Accordingly, the prosecution had to prove that petitioner's usurious loan to Bracken was part of a *conspiracy and corrupt agreement* and a scheme and business of making usurious loans. *Cf. Sanabria* v. *United States, supra* (defendant in a single count indictment was only charged with the crime of *conducting a gambling business* rather than a conspiracy). This was accomplished by introducing evidence of other usurious loans made by petitioner to Richard Sanchez and Ralph Starace, loans which constituted many of the underlying acts of the nine other outstanding indictments against petitioner. Significantly, these indictments involved different victims, different sums of money, different times of occurrence or different co-defendants than the Bracken indictment.

In this regard, Federal Constitutional Double Jeopardy should not bar prosecution of the underlying overt acts (usurious loans to Sanchez and Starace) which were just small differential pieces used to prove the greater criminal conspiracy. It is well-settled that double jeopardy is not violated when there are separate prosecutions for the conspiracy and the underlying overt acts. *Pereira* v. *United States*, 357 U.S. 1, 11 (1953); *United States* v. *Bayer*, 331 U.S. 532, 542 (1947); *United States* v. *Ricco*, 459 F.2d 264 (2d Cir. 1977); *United States* v. *Boyle*, 482 F.2d 755 (USCA D.C. Cir. 1973). Thus, when petitioner was convicted of

Criminal Usury in the First Degree where his usurious loan to Bracken was part of a "scheme or business" to collect such loans, he was not convicted of the same crime when he pleaded guilty to the nine other indictments which contained the "underlying acts" of the conspiracy.

Moreover, since the conspiracy and the "underlying acts" were not the same offense, petitioner did not receive multiple punishments. Lastly, although acquitted of extortion with respect to Bracken, manifestly different proof would have been required to support his convictions for extortion against Starace and Sanchez (the subjects of the other indictments). Accordingly, petitioner was not convicted of an offense (extortion) of which he had previously been acquitted.

POINT THREE

The prosecutor's conduct did not deprive petitioner of due process of law [answering petitioner's petition, Point Three, pp. 22-23].

Petitioner claims that the prosecutor's conduct during trial deprived him of due process of law. Specifically, he argues that the prosecutor: (1) repeatedly asked questions that the court had previously sustained objections to; (2) argued on matters not in evidence; (3) allegedly commented upon petitioner's failure to testify; and (4) erroneously asked for petitioner's income tax returns and referred to him as the "general". Petitioner's contention is baseless.

As to petitioner's first contention, although the prosecutor in this long, hard fought trial did repeat some ques-

tions which had already been objected to and sustained, the court again sustained the objections (T. 380, 401) and the prosecutor, after one incident, apologized to the court (T. 300). Surely this minor incident did not prejudice petitioner.

With respect to the prosecutor's referring to petitioner as the "General"* in his summation, it should be noted that the defense did not base its original objection on this comment (T. 304). However, although eventually moving for a mistrial on this ground, petitioner never objected to the curative instructions given by the court (T. 1315). Since petitioner apparently recognized the curative effect of these instructions, he waived this issue for appellate review in the state courts. *People* v. *Williams*, 46 N.Y.2d 1070 (1979). In any event, the prosecutor's comment was harmless. First, the assistant district attorney in good faith mistakenly believed that the term "general" had been brought to the jurors' attention (T. 1305A, 1306). Moreover, the court gave clear curative instructions, cautioning the jury to "completely disregard and remove from your minds the statement just made by . . . [the prosecuter] . . ." (T. 1315). Lastly, the court also redacted the checks given to petitioner by the witnesses which had been endorsed "g.e.n." (T. 1314-1315). Clearly, any error was thus rendered harmless.

Petitioner also contends that the prosecutor allegedly commented on petitioner's failure to testify. However,

* The indictment did refer to petitioner as Ralph "The General" Tutino. The trial court redacted mention of the word "General." In addition, petitioner's title page on his record on appeal to the Appellate Division was captioned, the People of the State of New York against Ralph "The General" Tutino as was the order of the Appellate Division affirming petitioner's judgment of conviction.

petitioner does not specifically indicate where in his summation the prosecutor was supposed to have made this reference. If he is referring to the prosecutor's comment that the jury had to decide ". . . the guilt or innocence beyond a reasonable doubt of . . . [petitioner] . . .", the court gave curative instructions which were not objected to (T. 1315) and this one isolated comment could not have prejudiced petitioner, especially where the court instructed the jurors in its charge that petitioner was presumed innocent, was "at no time required to prove his innocence," and that his guilt "must be established by the People beyond a reasonable doubt" (T. 1381-1383).

. As to petitioner's last contention, during the lengthy cross-examination of Richard Sanchez, the defense asked for the witness's income tax returns (T. 706). The prosecutor in reply asked for the tax returns of all the parties (T. 706). Petitioner did not object to this request until the next day (T. 765). Surely, this one isolated episode, belately objected to, in this long, hard fought trial did not prejudice petitioner.

Conclusion

Petitioner's application for a writ of certiorari should, in all respects, be denied.

Respectfully submitted,

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